

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 26, 2008

STOKLEY J.U. WAY v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Cocke County
No. 29, 544-1 Ben W. Hooper, II, Judge

No. E2007-02292-CCA-R3-PC - Filed October 29, 2008

The petitioner, Stokley J. U. Way, appeals the post-conviction court's denial of his petition for post-conviction relief. On appeal, he argues that he received the ineffective assistance of counsel at trial. After a thorough review of the record and the parties' briefs, the judgment of the post-conviction court denying relief is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Brad L. Davidson, Newport, Tennessee, for the appellant, Stokley J. U. Way.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; James B. Dunn, District Attorney General; and Joe C. Crumley, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner was convicted of two counts of rape and two counts of incest by a Cocke County jury. As a result, he received an effective sentence of fifteen years imprisonment to be served at 100%. The petitioner's convictions and sentences were affirmed on direct appeal. *See State v. Stokely J.U. Way*, No. E2002-00251-CCA-R3-CD, 2004 WL 234741 (Tenn. Crim. App. at Knoxville Feb. 9, 2004), *perm. app. denied* (Tenn. May 24, 2004). The following is a summary of the facts of the case taken from this court's opinion on direct appeal:

The defendant and the victim's mother divorced in 1983. The victim, who was an infant at the time of the divorce, is the defendant's daughter. She did not see the defendant again until she was nine (9) years old. In 1995, when the victim was thirteen (13) years old, the victim's mother was going through a troublesome divorce.

At this time, the victim moved to Tennessee to live with the defendant during the school year. She returned most summers to live with her mother in Washington state.

By all outward appearances, when she moved to the defendant's house, the defendant and the victim initially had a very normal, loving father/daughter relationship. The defendant enrolled the victim in school and got her involved in a church community. The defendant had another daughter from a different relationship who was several years younger than the victim. The younger daughter lived with the defendant and the victim on the weekends.

However, in August of 1995, shortly after the victim moved to live with the defendant, she and her father were watching a movie with explicit sex scenes. The victim asked the defendant what the people in the movie were doing. The defendant then took the victim into the bedroom. When they got into the bedroom, the defendant asked her if she trusted him. She said she did. He then told her to take off all of her clothes. He again asked her if she trusted him. After she answered yes, he had her lie on the bed and inserted the handle of a brush inside her vagina. He then asked the victim if she was alright and if she trusted him. She again said yes. The defendant then inserted his fingers inside of her vagina. He again asked her if she was alright and if she trusted him. She again said yes. The defendant then took off his clothes and proceeded to have intercourse with the victim until he ejaculated.

The victim lived with the defendant until she graduated from high school in June of 2000. From August of 1995 until June of 2000, the victim and the defendant had sexual relations on a continuous basis. The defendant became very jealous of any relationships the victim had with boys, and he even refused to keep a copy of her picture from prom because there was a boy in the picture. He punished her for various offenses by taking her car away or depriving her of sleep. She engaged in sexual relations with him to end her punishment.

The victim did not seek help or press charges while she lived with the defendant. She did tell one friend and a sister who lived in Washington state about her relationship with the defendant. Her mother came to her graduation in the Spring of 2000. At the graduation, the victim introduced her mother to her boyfriend. When someone introduced the defendant to the victim's boyfriend, he grabbed his younger daughter and stormed out of the graduation. The victim's mother became suspicious of the "look" on his face and his reaction when he met the victim's boyfriend. The victim's mother confronted the defendant later that night with her suspicions. He told her that he was mad because the victim had never told him about a boyfriend. He said that the victim was a liar and was deceitful.

After the victim's mother returned to Washington state, the victim called her and told her mother about the sexual relationship with the defendant. The victim then flew

out to Washington a few days later to visit her mother for the summer. After the victim got to Washington, she filed a police report with the police in Washington and got a restraining order.

Stokely J.U. Way, 2004 WL 234741 at *1-3.

The petitioner filed a timely petition for post-conviction relief. Thereafter, post-conviction counsel was appointed and an evidentiary hearing was held. At the hearing, the petitioner did not testify but rather elected to represent himself and conducted the examination of his trial counsel. The petitioner prepared exhibits comprised primarily of copied portions of the trial transcript and the preliminary hearing transcript, which were entered into evidence as a collective exhibit. The petitioner then conducted a rigorous examination of his counsel who represented the petitioner at trial. In response to the petitioner's questions, trial counsel testified that he had been practicing law for nineteen years as a criminal defense attorney and had handled dozens of rape cases. Counsel noted that the petitioner had fired his retained counsel on the eve of trial and he was appointed to represent the petitioner. Counsel said he was given a continuance by the court and he and others poured themselves into the case at that point in time.

Counsel testified that there was no DNA evidence and no medical evidence of sexual contact; rather, the victim's statement and testimony constituted the primary evidence against the petitioner in the case. Counsel also noted that the petitioner had confessed to his preacher. Regarding the introduction of the victim's panties at trial, counsel recounted that the victim testified at the preliminary hearing that the petitioner had given her "lingerie outfits or thong panties" but she had thrown those items away. Counsel recalled that the state introduced four pairs of the victim's panties at trial. Counsel testified that he did not see a discrepancy where the victim had indicated disposal of certain panties which were gifts from the petitioner, then later discussed panties retrieved from her wardrobe. Counsel said that "she's talking [at trial] about some other underwear. I suppose she had more than four pairs of underwear." Counsel said that he saw no basis to object to the admission of the victim's panties because the state had a right to introduce evidence collected as part of its case.

Counsel testified that he believed the state's introduction of the victim's panties was immaterial and carried no prejudice as the evidence had no effect other than to show that "this girl had panties." Counsel noted that he vigorously cross-examined Detective Woods about the fact that he failed to do his job by not having the panties tested for DNA. Counsel said he thought the state's introduction of the victim's panties without DNA testing helped the petitioner's case as it discredited the testimony of Detective Woods. Counsel further stated that he did not request DNA testing on the panties because the results would have placed him in an ethical bind if the panties were found to have the petitioner's DNA on them.

Counsel testified that the victim made a remark at trial indicating that the petitioner was good to her and she was happy staying with him. Counsel noted, however, that the victim stated at the preliminary hearing that the petitioner was verbally and emotionally abusive to her. Counsel said

that he did not use the victim's preliminary hearing statement at trial to contradict her trial testimony because he did not want the jury to hear the victim's remarks regarding the abuse.

When questioned by the petitioner regarding the potential impeachment value of the victim's medical records, counsel first noted that he could not recall what medical records were available to him without reviewing his file. Counsel then stated that he remembered that a rape kit was performed on the victim, and if he had access to the medical records, he would have examined them. However, counsel noted that he would not be allowed access to an individual's medical records without their consent or a court order. At this time, the petitioner introduced the victim's medical records which indicated that several of the victim's pap smears from 1997 to 1999 showed inflammation and possible vaginal infection. The records of the victim's examinations in 1996 and 1997 also showed the presence of blood and white vaginal discharge. When asked by the petitioner to speculate as to whether the medical records showed the existence of a sexually transmitted disease (STD), counsel said he was not sure. However, counsel noted that introducing the victim's medical records at trial to show that the victim had an STD was not beneficial or relevant to the defense because such action did not exclude the petitioner from having sexual relations with the victim.

Upon examination by the state, counsel testified that he did not introduce the victim's preliminary hearing statement into evidence at trial because the statement discussed in graphic detail the sexual relationship the petitioner was having with the victim. Counsel recalled that he used certain portions of the victim's preliminary statement in attempt to impeach her testimony at trial.

After the hearing, the post-conviction court entered an order denying post-conviction relief. The petitioner appealed.

ANALYSIS

On appeal, the petitioner contends that the post-conviction court erred in denying relief. The petitioner argues that he received the ineffective assistance of counsel because counsel failed to object to the introduction of the victim's panties at trial. The petitioner also submits that counsel was ineffective in failing to investigate the victim's medical records to determine whether or not she had an STD.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations of fact set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

To establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A fair assessment of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Both deficient performance and prejudice must be established. *Strickland*, 466 U.S. at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Strickland*, 466 U.S. at 697. In considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." *United States v. Cronin*, 466 U.S. 648, 665 n. 38 (1984).

We begin our review by noting that success or perfection is not the standard of measure for counsel's performance; rather, a petitioner is entitled only to constitutionally adequate representation. *See Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). Regarding the introduction of the victim's panties, counsel testified that he saw no basis to object to the state's introduction of the victim's panties as their introduction revealed nothing more than the fact that the victim wore panties. Moreover, counsel testified that he thought the state's introduction of the victim's panties without DNA testing helped the petitioner's case as it discredited the testimony of a state witness. Counsel said he did not see a contradiction in the victim's testimony about disposing lacy or thong underwear and the introduction of four pairs of panties belonging to the victim because he assumed the victim owned more underwear than the underwear disposed of. Addressing this issue, the post-conviction court stated the following to the petitioner:

[W]e've had some lengthy discussion today about the introduction of the undergarments, the panties, whatever we wish to call them. Quite frankly, the admission of that evidence - - let it be put this way, that evidence had absolutely no bearing on this case one way or the other. It didn't hurt you. It didn't help you. It didn't hurt the State. It didn't help the State. They were introduced, and that was really the end of that.

The evidence in the record does not preponderate against the post-conviction court's findings that trial counsel was not deficient in failing to object to the introduction of the victim's panties at trial. The issue is without merit.

The post-conviction court also addressed the petitioner's allegation that counsel was deficient in failing to investigate and introduce the victim's medical records in effort to show that she might have an STD. The court noted that such an admission would have been speculative at best and found no possibility of prejudice. Like the post-conviction court, we conclude that there is no merit to the petitioner's allegation. We first note that no proof was presented establishing that the victim actually had an STD. The petitioner's allegation in this regard amounts to nothing more than speculation. Moreover, assuming *arguendo* that the victim had an STD, this fact did not exclude the petitioner from committing the offenses for which he was convicted. Accordingly, we conclude that the petitioner has failed to show either deficient performance by counsel or resulting prejudice, and the issue is without merit.

CONCLUSION

The petitioner has failed to meet his burden of proof regarding his claims of ineffective assistance of counsel and the post-conviction court correctly denied the petition. Therefore, the judgment of the post-conviction court is affirmed.

J.C. McLIN, JUDGE